

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 356 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

THE STATE OF GUJARAT

Versus

SUMRA MUSABHAI NATHUBHAI

Appearance:

MR KT DAVE, APP for Petitioner
MR AD SHAH for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH and
MR.JUSTICE A.K.TRIVEDI
Date of decision: 18/01/99

ORAL JUDGEMENT (Per M.S. Parikh, J.)

1. This acquittal appeal by leave has been directed against the judgment and order dated 10/1/1985 rendered by the learned Sessions Judge, District Jamnagar, in Sessions Case No. 74 of 1983. Respondent-accused Sumra Musabhai Nathubhai has been acquitted of the offences

punishable u/S. 302 of the Indian Penal Code ('IPC' for short) and sec. 25 (1)(a) of the Arms Act. The respondent hereinafter will be referred to as 'the accused'.

2. As per the charge exh. 5 the accused was alleged to have committed murder of Mamad Sidi of village Masitiya by causing fatal injury on the person of the deceased by means of a gun shot at about 8.00 a.m. on 4/2/1983. He has been charged with possession of the gun in question without holding licence issued in accordance with the provisions of the Arms Act, 1959. The prosecution story is referable to the ocular account rendered by the eye witness, P.W. 3 Husen Noor Mamad exh. 25. It might be noted that his brother Punja Noor Mahmad was also stated to be present at the time of the incident in question, but has not been examined. However, according to Husen Noor Mamad, at about 8 O'clock in the morning he was attending to the work of drawing of water towards his field. He was standing nearby the cart way, which was within his sight. At that time Mamad Sidi, since deceased, was proceeding on his bicycle from the side of the village. At that time accused Musa Nathu was taking rounds in his field with a gun in his hand. When Mamad Sidi, since deceased, reached the place of incident the accused asked him to stand there. When Mamad Sidi tried to take a turn, accused fired at him. The witness Husen Noor Mamad and his brother Puja had therefore rushed to the place of incident and the accused had run away with his gun towards the well (located in the field of the accused). Mamad Sidi was injured on the left side of his face. He asked his brother Puja to wait there and went to the field of Amad Sidi (brother of Mamad Sidi), since deceased. He informed that when Mamad Sidi was proceeding from the cart way, the accused Musa had fired at him and he was bleeding and was still having life. Thereafter, the witness accompanied with Amad and reached the place of incident by bullock cart driven by Fakir Samad. In the background of this ocular account of the prosecution story, the accused was tried before the learned Sessions Judge. As stated above, Husen Noor Mamad was the only eye witness examined before the learned Sessions Judge. At the conclusion of the trial and after recording further statement of the accused the learned Sessions Judge rendered acquittal as aforesaid bearing in mind number of circumstances flowing from the prosecution evidence. That is how the State is before this Court.

3. We have heard Mr. K.T. Dave, Ld. A.P.P. for

the State and Mr. A.D. Shah, Ld. Advocate appearing for the respondent - accused. The circumstances which were found to be flowing from the prosecution evidence, on the basis of which the learned Sessions Judge has not accepted the ocular account of the prosecution story might briefly be noted.

I. There has been delay of lodging the F.I.R. which has not been satisfactorily explained. The incident was alleged to have occurred at about 8 O'clock in the morning; whereas the F.I.R. was lodged at about 12 O'clock at noon on the same day. The distance between village Masitiya and Police Station is shown to be around 10 K.Ms. and it took around half an hour to reach the police station. However, the time gap between the occurrence and lodging of the F.I.R. is nearly 4 hours. It has been the defence version that the prosecution story has been concocted on account of enmity between the accused and the eye witness on one side and between the complainant and the accused on the other side.

II The medical evidence as reflected from the oral testimony of Dr. Bansidhar Ganpatlal Gupta, P.W. 1 Exh. 22, has disclosed that injury no. 2 out of the three injuries noticed on the person of deceased Mamad Sidi could be atleast 12 hours old, that is to say the occurrence could not be at 8 O'clock in the morning, but it could be at or around 4 O'clock in the morning. This would give a go bye to prosecution story emanating from the solitary eye witness examined by the prosecution.

III. The investigating agency has not tried to explain injuries other than the bullet injury which has resulted in the death of Mamad Sidi.

IV. Medical evidence has also brought to light the fact that semen appeared to have oozed out from the genital organ of the deceased and although Ieshaben, wife of deceased Mamad Sidi was cited as a witness she was not examined, with the result that possibility of recent illicit intercourse between deceased Mamad Sidi and some other woman was not ruled out and in that event some other story would have flown.

V. The ballistic report exh. 42 indicates that no opinion could be given regarding time of firing

of Muddamal gun, that no opinion could be given whether the hole on exh. B, the woolen blanket, could be due to firing from the Muddamal gun and that no opinion could be given whether the 4 metallic pieces found from cranial cavity of the deceased, came out from the Muddamal gun.

VI. There were chapter cases in the recent past between the accused and the complainant Amad Sidi as also there were proceedings of breach of peace as between the eye witness and the accused, but there was no enmity between deceased Mamad Sidi and the accused. This would show absence of motive on the part of the accused qua the deceased; whereas presence of inimical state of mind between the accused and the eye witness as also between the accused and the complainant, who happened to be deceased Mamad Sidi's wife's brother.

VII. There has been correction in the F.I.R. and so far as the Panchnama exh. 29 is concerned ink of the names of the Panch witnesses differs from the ink of the body writing of the Panchnama.

VIII. There are blood stains at two different places on the cart way and the investigation is directed only with regard to the blood samples from the earth portion of one place.

IX. Panchnama exh. 109 does not indicate any growing crop which would require the eye witness to stay over night in the field, although there is no temporary or permanent accommodation for staying over night available in the field of the eye witness.

X. The distance from where the bullet must have been fired becomes doubtful from the nature of the bullet injury.

XI. The finding of the gun, Muddamal article no. 8 as per the evidence of Panchnama exh. 27 becomes doubtful on the scrutiny of the evidence of the Panch witness as also the Panchnama.

XII. The map prepared from the Panchnama of the scene of offence appearing at exh. 34 would indicate that if accused had an occasion to shot at the deceased from his field, it would be any portion of the right side of the face of the deceased

that would be struck. It is here that the correction in the F.I.R. as also improvisation of the prosecution story in the evidence for the first time about the deceased having halted and taken turn at the accused who called him to wait. Even then it would become doubtful if the left mandible where there was the impact of bullet, could be exposed. It might be in all probability the front portion of the face getting exposed to the impact of bullet fired from the gun, even if improvised prosecution story is pressed against the accused.

XIII. The blanket stated to have been put on by deceased Mamad Sidi at the time of incident was found from a different spot from the actual place of incident.

XIV. The cycle on which deceased Mamad Sidi was stated to be proceeding was also lying at a distance of about 7 ft. to the east of the cart way.

XV. The deceased covering his head with the blanket would indicate some early hours of the day of incident and not 8 O'clock in the morning.

4. Based on the aforesaid circumstances, the learned Sessions Judge has come to the conclusion that it would be hazardous to rely upon the solitary ocular account of the prosecution story flowing from P.W. 3 exh. 25 and that the accused deserved benefit of doubt. Mr. K.T. Dave, Ld. A.P.P. for the State tried to explain each of the aforesaid circumstances and if they are taken in exclusion of other circumstances, it might be possible to explain them individually as submitted by Mr. Dave. However, even in that respect we are not in a position to countenance any reasonable or plausible explanation regarding the probable time of incident in the face of the medical evidence and other aforesaid circumstances, which have been discussed at length by the learned Sessions Judge. We have gone through the medical evidence and we find that there is no reason to doubt the same. The evidence of the medical witness would indicate that injury no. 2 being abrasion 1.5 cm x 0.5 cm. scrap on the left cheek prominence was atleast 12 hours old anti mortem and would disclose that the incident might in all probability have occurred at around 4 O'clock in the morning. If that be so, prosecution story as aforesaid would not stand. We have gone through the evidence of all the aforesaid witnesses and the documents placed on record and we find that the circumstances on which

reliance has been placed by the learned Sessions Judge do flow from the prosecution evidence. Even if a particular circumstance might be explained, it would be clear that the cumulative effect of all the circumstances relied upon by the learned Sessions Judge would make the ocular account of the prosecution story seriously doubtful. Even if two views of the prosecution evidence are possible the view that has been expressed by the learned Sessions Judge who had an occasion to observe the witnesses has to be given an appropriate weight in the absence of any manifest error or illegality shown to have been committed. It would, therefore, be difficult to interfere with the acquittal of the accused. Mr. A.D. Shah, learned advocate for the respondent has in this connection drawn our attention to a decision of the Apex Court in the case of Garasia Ratubha Hanubha v/s. State of Gujarat reported in 1997 (3) G.L.R. 2365. Following observations appearing in para. 5 thereof would assume importance in so far as the facts of the present case are concerned :-

"No doubt it is well settled that the powers of an appellate Court to review evidence in appeals against acquittal is as extensive as its powers in appeals against convictions, but that power is with a note of caution that the appellate Court should be slow in interfering with the orders of acquittal unless there are compelling reasons to do so. If the finding reached by the trial Court cannot be said to be an unreasonable finding, then the appellate Court should not disturb that finding. It is also a settled law that if two views are possible on the evidence on record and the trial Court has taken one of such views it is not for the appellate Court to evaluate the evidence and take a different view than the one taken by the trial Court."

In the result, this appeal deserves to be dismissed. Order accordingly. Surety/sureties shall stand discharged.

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PVR CR.A.35685j.